IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE C.N.RAMACHANDRAN NAIR
&
THE HONOURABLE MR. JUSTICE K.M.JOSEPH

THURSDAY, THE 21ST DECEMBER 2006 / 30TH AGRAHAYANA 1928

Cus.Appeal.No. 10 of 2005()

A.NO..C/166/2004 of CUSTOMS,EXCISE&SERVICE TAX APP.TRIBUNAL,BANGALORE
.....

APPELLANT/APPELLANT.

M/S/RUBIFILA INTERNATIONAL LIMITED,
NEW INTERNATIONAL DEVLEOPMENT AREA,
KANJIKODE, PALAKKAD, KERALA.

BY SR. ADV. SRI. ARVIND P. DATAR WITH ADV. SRI. JAIKUMAR
BY ADV. SRI.BECHU KURIAN THOMAS

RESPONDENTS: RESPONDENTS.
---

1. THE CUSTOMS, EXCISE AND SERVICE TAX,
APPELLATE TRIBUNAL, SOUTH ZONAL BENCH,
FKCCI-WTC BUILDING, K.G.ROAD, BANGALORE 560 009.

2. THE COMMISSIONER OF CUSTOMS,
C.R.BUILDINGS, I.S.PRESS ROAD, COCHIN.

BY ADV. SRI.JOHN VARGHESE, ASSISTANT SG

THIS CUSTOMS APPEAL HAVING BEEN FINALLY HEARD
ON 7.7.2006 THE COURT ON 21.12.2006 DELIVERED THE
FOLLOWING:

C.N.RAMACHANDRAN NAIR &
K.M. JOSEPH, JJ.

CUSTOMS APPEAL NO. 10 OF 2005

Dated this the 21st day of December, 2006

JUDGMENT

CR

Ramachandran Nair,J.

This appeal is filed under Section 130 of the Customs Act, 1962 against the order of the Customs Excise and Service Tax Appellate Tribunal, South Zonal Bench, confirming the order of the Commissioner of Customs declining the appellant's claim for drawback of Rs. 77,97,236/- with further order imposing a penalty of Rs. 5 lakhs in lieu of confiscation of goods.

2. Appellant is a manufacturer and exporter of Heat Resistant Latex Rubber Threads (HRLRT). 97 % by weight of the appellant's product is natural rubber. Until June 2002, the appellant was importing raw material, namely, centrifuged latex along with chemicals for manufacture of HRLRT, which entitled them for drawback of customs duty paid on imported raw materials including centrifuged rubber latex

under Section 75 of the Customs Act read with the provisions of Customs and Central Excise Duties Drawback Rules, 1995. However, from June, 2002 on account of restrictions imposed by the Government of India on import of centrifuged latex, the appellant used natural rubber produced indigenously for manufacture of their product namely, HRLRT. However, the appellant had earlier approached the Ministry on 10.8.2001 for fixing the drawback entitlement based on All Industry Rates without reference to the actual duty paid. Government by taking into account the incidence of duty on import of raw materials furnished by the petitioner issued circular No. 80/2001 dated 10.12.2001 extending the drawback benefits to appellant's product by bringing in the item within SS No. 40.06 and 40.07 of the Drawback Schedule on the inputs used for the manufacture of HRLRT. Based on the rates prescribed by the Circular the appellant submitted drawback claim in respect of 22 shipping bills claiming drawback of Rs. 78,10,667/-. It was specifically declared in the claim that manufacturing pattern continued as in the past, virtually meaning that appellant was depending on imported raw materials for the production of the items

exported under the shipping bills covered by the claim. Following is the part of the declaration furnished by the appellant:

> "That there is no change in the manufacturing formula and in the quantum per unit of the imported material or components, utilised in the manufacture of the export goods, and that the materials or components which have been stated in the application under Rule 6 or Rule 7 of the Draw Back Rules, 1995, to have been imported, continue to be so imported and are not obtained from indigenous sources"

Even though the appellant specifically asserted that raw materials used were imported and not indigenously procured, the Department got intelligence information that appellant was not importing any raw material and entire rubber latex used in the production or rubber thread exported by the appellant was indigenously sourced without payment of any excise duty. Therefore customs authorities conducted inspection in the factory of the appellant and the Deputy General Manager in-charge of the factory gave statement to the effect that appellant was not engaged in any import of natural rubber and the natural rubber used in the production of rubber thread for export was locally sourced on

which duty of excise is payable. As already stated, it is a conceded position that 97% by weight of the product, namely, rubber thread is natural rubber on which no duty of excise is paid or payable by the appellant. Even though 3% by weight of the raw materials used is partly imported, the claim for drawback towards duty paid is insignificant and therefore the Commissioner of Excise issued show cause notice pointing out that the appellant's claim is based on mis-declaration, a fraud on the department, and proposed to reject the same . The appellant raised a contention that they are entitled to duty drawback on natural rubber, even if no duty is paid on raw material used either under the Customs Act or Excise Act, based on clause 3 of circular No. 24/2001-Cus. dated 20.4.2001. However, the Commissioner of Excise overruled the appellant's objections, referred to Rule 3 of the Drawback Rules and stated that there is a clear bar under the Rule against grant of drawback on goods produced without payment of any duty on the inputs. Further the Commissioner relied on clause 6 in the circular which authorises the Department to decline drawback if the claim on enquiry is based on fraud. Accordingly

appellant's claim for drawback was rejected and since goods have been already exported, in lieu of confiscation, penalty of Rs. 5 lakhs was levied. The appellant took up the matter in appeal before the Tribunal which after considering the appellant's claim in detail dismissed the appeal completely agreeing with the views of the Commissioner of Excise. It is against this order of the Tribunal that this appeal is filed under Section 130 of the Customs Act.

3. We have heard senior counsel Sri. Arvind P. Datar, appearing for the appellant, and Asst. Solicitor General Sri. John Varghese appearing for the respondents.

4. At the outset, we observe that appeal will lie to this Court against the orders of the Tribunal under Section 130 of the Customs Act only on substantial questions of law. Even though appellant has framed five questions of law, and claimed those to be substantial questions of law, we are unable to accept the claim. The only question arising from the order of the Tribunal is whether the appellant can claim drawback against the statute that is in clear violation of Section 75 of the Customs Act and Rule 3 of the Drawback Rules, based on

circular No. 24/01 dated 20.4.2001. Counsel for the appellant relied on the following decisions of the Supreme Court CHEMICALS & FIBRES OF INDIA LTD., V. UNION OF INDIA, (1991) 54 ELT 3 (SC), STATE OF U.P. V. SUKHPAL SINGH BAL, (2005) 7 SCC 615, KALYANI PACKAGING INDUSTRY V. UNION OF INDIA, (2004) 6 SCC 719, SANDVIK ASIA LTD. V. COMMISSIONER OF INCOME TAX I, PUNE, (2006) 2 SCC 508, and that of this Court in PREMIER TYRES LTD. V. ASST. COLLECTOR, 1980 ELT 161 (KER.) AND C.A. CHACKO V. STATE OF KERALA, (2005) 142 STC 490 and contended that circulars are binding on the departmental authorities and the circulars should be enforced even against statutory provisions. Asst. Solicitor General appearing for the respondents relied on decision of this Court in PREMIER TYRES LTD. V. ASST. COLLECTOR & OTHERS, reported in 1980 E.L.T. 161 wherein this Court held that no drawback claim can be allowed under Section 75 of the Customs Act unless customs or excise duty is paid on the raw materials used in the manufacture of product. In this regard, we feel two aspects call for decision. In the first place, appellant's argument

will stand only if circular relied on by the appellant under which drawback on natural rubber is claimed will entitle the appellant for drawback for the raw materials, namely, rubber latex on which admittedly no duty of custom or excise is paid. (2) Even though circular authorises the department to give drawback without reference to the actual duty paid based on All Industry rate fixed by the Government, it is made clear that if any claim, on enquiry, is found to be fraud, then the department is bound to decline it. Therefore if the claim of the appellant is a fraudulent one then circular itself does not entitle the appellant to get the benefit. The facts as disclosed in the order of the Commissioner and accepted by the Tribunal are that appellant along with drawback claim made a misdeclaration which is extracted above, confirming that appellant's manufactured goods covered by shipping bills in respect of which drawback is claimed were manufactured by use of raw materials on which duty of customs is paid. This is admittedly a false statement and a misdeclaration and the same is revealed by records verified by the department at the factory of the appellant and the same is confirmed by the statement of the Deputy

General Manager in charge of the factory, which is an admissible evidence under Section 108 of the Customs Act. Neither in the adjudication before the Commissioner, nor in the appeal, and not even before this Court, appellant has a case that any part of the natural rubber used in the manufacture of rubber thread exported covered by 22 shipping bills is imported from abroad. On the other hand, it is admitted case of the appellant itself that the entire rubber constituting 97% by weight of the manufactured product is indigenously sourced on which no excise duty was payable. Therefore appellant's declaration in support of the claim of drawback is a misdeclaration and is obviously made to defraud the Government. In the circumstances, and in view of the specific clause 6 of the circular above mentioned, we are of the view that the appellant is not entitled to refund on account of fraud played on the department and established by them. Therefore there is no need to go into the various judgments of the Supreme Court which say that circulars are binding on the departmental authorities. We are sure, no decision of the Supreme Court has authorised a fraud on the Government to entitle a person to claim refund of above Rs. 77 lakhs,

when he is entitled to nothing. Appeal has therefore to be dismissed on this ground alone. Even though counsel for the appellant submitted that duty paid on 3% of the quantity of item used is entitled to refund, we are unable to accept this because appellant has played a fraud on the department. Even though appellant is entitled to a small amount of drawback in respect of 3% by quantity of raw material used which is stated to be imported, we do not think the appellant is entitled to the same because of the conduct of the appellant, it forfeited the claim.

5. However, before parting with this matter, we are constrained to take note of the circular which is not free from doubt, and which led to this case. Had the department not vigilant the result would have been loss of above Rs. 77 lakhs to the Government, which is obviously on account of the circular which authorises issue of drawback without reference to proof of payment of duty to the department. Clause 3 of the circular gives a licence to any person to claim All Industry rate without reference to actual duty paid. In this connection we are constrained to take note of the mandatory provision of Section 75 of the Customs Act which authorises drawback only on actual duty paid

on the inputs used for the manufacture of goods for export whether it is a customs duty or excise duty. Moreover Rule 3 of the Drawback Rules also makes it clear that no claim for drawback will lie when no duty is paid either under the Customs Act or under the Excise Act on the inputs used for the manufacture of final product. Therefore the circular is a clear violation of Section 75 of the Customs Act and Rule 3 of the Drawback Rules. The very purpose of circular is to make the work of officers easier and not to go against the law enacted by Parliament. We feel the proof of payment of duty on the inputs either under the Customs Act or under the Excise Act is mandatory for considering claim for drawback no matter whether actual duty paid is refundable or not. Probably in order to standardise the claim All Industry rate can be fixed, but it should be so fixed as to reflect more or less the near amount of duty paid or otherwise circular will go against the statute. Circular cannot have any more value then the delegated legislation which should not go against the statute authorising it. We therefore direct the concerned Department of the Government of India or the Central Board of Excise and Customs to modify the circular to

prevent fraud.

The Commissioner of Customs will forward a copy of this judgment to the concerned authority, who issued circular, and he shall take it as a direction to him from this Court and comply with it.

Counsel for the appellant has produced copy of another order of the Tribunal whereunder drawback was stated to be granted based on All Industry Rate without actual payment of duty. If drawback is granted by practising fraud, the same calls for enquiry by the department. The Asst. Solicitor General will forward a copy of this order to the Central Board for follow up action, if there is fraud.

(C.N.RAMACHANDRAN NAIR)
Judge

(K. M. JOSEPH)
Judge